

Workplace Law Alert



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Alabama's New Child Labor Law

On May 18, 2009, Governor Riley signed into law the Child Labor Reform Act of 2009. The new Act, effective immediately, reforms Alabama child labor enforcement standards in an attempt to more closely align the state's regulations with applicable federal standards. One of the most notable changes is the transfer of the permitting process from the public school system to the Alabama Department of Labor.

Under the Act, minors are no longer required to obtain a work permit to attain employment. Instead, employers are required to purchase and display a certificate allowing them to employ minors. Class I certificates allow for the employment of minors aged 14 or 15 while a Class II certificate covers the employment of minors aged 16 or 17. Each certificate is accompanied by a \$15.00 application fee and must be renewed annually. Application forms are available online at https://www.alabamainteractive.org/child_labor_certificate/welcome.action.

The Act requires employers to display a Child Labor Law poster (available at <http://www.alalabor.alabama.gov/PDFs/CHILDLABOR/ChildLaborLawPoster.pdf>) in every location that employs minors under the age of 19. Additionally, each employee under the age of 19 must have his own separate personnel file. The file must be kept on premises and contain the employee's name, home address, date of birth, date of hire, proof

of age, school of attendance, and time records. Time records must state the number of hours worked each day, starting and ending times, and break times. Additionally, personnel files of employees under the age of 16 must contain the minor's "eligibility to work" form. This form is issued by the employee's school and certifies that the student has satisfactory grades and attendance in order to be employed. Employers are required to retain these personnel files for a minimum of three years.

The hours that minors may work has been limited by the Act as well. The Legislature has distinguished working hours for minors based on both the age of the employee and whether school is in session. When school is in session minors aged 16 or older who are currently enrolled in either a public or private primary or secondary school, may not work between 10 p.m. and 5 a.m. on any night preceding a school day (i.e., Sunday through Thursday). During the summer months minors over the age of 16 do not have any work hour restrictions.

The regulations for minors under 16 are considerably more stringent. During the school year they are not allowed to work more than three hours after school or more than eight hours on any non-school day. Additionally, they cannot work before 7 a.m. or after 7 p.m. each day or more than six days

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Alabama's New Child Labor Law

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in one week. Their weekly workload is capped at 18 hours per week. Finally, they are not allowed to work during school hours (8 a.m.-3 p.m.) unless they have completed the course of study required for secondary schools. During the summer months minors under 16 are limited to a workday of no more than eight hours. Their workweek is still limited to six days but they may work up to 40 hours per week. Additionally, they still may not work before 7 a.m. but they may work as late as 9 p.m. Finally, employed minors aged 14 and 15 must receive documented, uninterrupted breaks of at least 30 minutes. A break must be given for each five hours of continuous work. The Act does not contain a similar requirement for those aged 16 and above.

After the passage of the Act, Alabama law now requires minors to attain the age of 14 before seeking employment. Even then the Act restricts the occupations in which minors may be employed. For example, minors under the age of 16 are not permitted to work at lumberyards or to sell fireworks without the direct supervision of someone over the age of 18. A few of the prohibited occupations for minors under the age of 18 include firefighting, butchering, and railroad employment. The Act does carve out an exception from the prohibited occupations for minors age 16 or 17 enrolled in work-study, cooperative education, or similar programs. A more comprehensive list of prohibited occupations for minors can be found on Alabama's Department of Labor's website in their Child Labor Law brochure. This can be

found at <http://www.alalabor.alabama.gov/PDFs/CHILDLABOR/ChildLaborBrochure.pdf>.

One of the most noteworthy prohibitions on the employment of minors is in regards to establishments that serve alcohol. Employees must be 21 in order to serve alcoholic beverages for consumption on business premises (19 if the employer is certified through the Responsible Vendor Program) and 18 to work in the area of the establishment where alcohol is served. Minors 16 and older may be employed only as busboys, janitors, dishwashers, cooks, hostesses, or seaters. A minor aged 14 or 15 may not work in an establishment that serves alcohol.

The Act also allows for civil penalties against those who violate the child labor laws. Most violations of the Act are subject to a civil penalty of \$300. However, if an employer is found to have employed a minor in a prohibited occupation he can be subjected to a civil penalty of up to \$5,000. Further, the recent changes include a whistleblower provision designed to protect those who report violations of the Act.

The Act, as mentioned above, became effective when signed by the Governor. Also, a provision in the Act specifically repealed all laws which were in conflict with the Act. As a result, employers who currently employ minors are obliged to comply immediately with the new requirements of the Act. If you have any questions about the Child Labor Reform Act of 2009 or how it affects your business, please contact Tom Scroggins at (205) 633-0227.



“...if an employer is found to have employed a minor in a prohibited occupation he can be subjected to a civil penalty of up to \$5,000.”



Sorry Plaintiffs: No Mixed-Motive ADEA Claims

The Age Discrimination in Employment Act (ADEA) passed in 1967, prohibits discrimination against an employee because of age with respect to any term, condition, or privilege of employment. On June 18, 2009, the Supreme Court ruled that an employee must prove that age was the “but-for” reason for the adverse employment action not just that it was a motivating factor. ADEA plaintiffs now have a higher hurdle to overcome than before.

In *Gross v. FBL Financial Services, Inc.*, Jack Gross previously held the position of claims administration director, but was reassigned to claims project coordinator when he was 54 years old. Many of Mr. Gross' job responsibilities

were transferred to a newly created position, claims administration manager, and the position was given to a female in her early forties. Although Mr. Gross' new position and the newly created position received the same compensation, Mr. Gross saw the reassignment as a demotion. Mr. Gross filed suit against FBL alleging that his reassignment violated the ADEA which, as stated above, makes it unlawful to take adverse action against an employee “because of such individual's age.”

The jury determined that Mr. Gross produced evidence that his age played a role in the decision to reassign him and thus awarded Mr. Gross

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Sorry Plaintiffs: No Mixed-Motive ADEA Claims

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\$49,945.00 in lost compensation. However, the Eighth Circuit Court of Appeals reversed the decision and remanded the case for a new trial holding that the jury was given incorrect instructions. The jury had been given instructions setting forth the standard established in *Price Waterhouse v. Hopkins* which held that if a Title VII plaintiff shows that discrimination was a motivating or substantial factor in the employer's actions, the burden shifts to the employer to show that it would have taken the same action regardless of the impermissible consideration. This holding relates to "mixed-motive" cases where the plaintiff alleges that the decision was made because of both permissible and impermissible considerations. The Appeals Court found that the burden does not shift to the employer unless Mr. Gross presented "direct evidence" that the impermissible consideration was a substantial factor in the decision.

While the Supreme Court took the case to answer whether a non-Title VII plaintiff had to present direct evidence of discrimination to obtain a mixed-motive instruction that allows the burden

to shift to the employer, instead the Court held that the ADEA does not authorize a mixed-motive age discrimination claim at all. The bottom line for the Court was that the "because of" language in the ADEA meant that an ADEA plaintiff has to show that age was the "but-for" cause or "the reason" that the decision was made. While four other justices reminded us that the Court held that "because of" does not mean "but-for" in Title VII cases, a majority of the Court held that although the statutes are very similar, cases decided under Title VII do not necessarily apply to cases brought under the ADEA.

While employers should not view this case as a license to demote or discharge employees based solely on their age, it does mean that plaintiffs bringing ADEA claims have to prove more than that age played some role in the decision. The ADEA applies to employers with 20 or more employees. Employers subject to the ADEA must be familiar with the limitations placed upon them by the Act. Questions about ADEA requirements or claims may be directed to Brooke Nixon at (205) 633-0236.



"...plaintiffs bringing ADEA claims have to prove more than that age played some role in the decision."

"No-Match" Regulations are No More

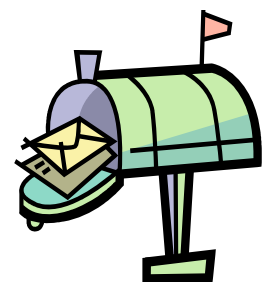
Many employers in recent years have been the unhappy recipient of a short form letter from the Social Security Administration advising them that they have one or more employees on their payroll whose reported name does not match the correspondingly reported social security number. Sometimes it is caused by an innocuous error. Other times, and more ominously, it means the employee is using false documents to verify his work eligibility.

In 2007 the U.S. Department of Homeland Security issued regulations detailing steps employers had to take upon receipt of a no-match letter, including checking for errors and asking the employee to provide corrected information or documents verifying the employee's identity and authorization to work in the United States. Following these steps entitled an employer to safe harbor protection from prosecution for knowingly employing an

unauthorized worker. These regulations, however, never went into effect as a federal judge in San Francisco entered an injunction prohibiting their enforcement soon after their implementation.

On July 8, 2009, DHS announced that it would rescind the controversial regulations. This does not mean that "no-match" letters will not be sent, only that employers are still left to their own best judgment about what to do when they are received, which, incidentally, tended to be what was required by the now-defunct regulations.

Despite the rescission of these regulations, employers should still have a plan of action for what to do upon receipt of a no-match letter. If you have questions about no-match letters and other immigration-related issues please contact Tom Scroggins at (205) 633-0227 or Brooke Nixon at (205) 633-0236.



E-Verify On the Near Horizon for Federal Contractors

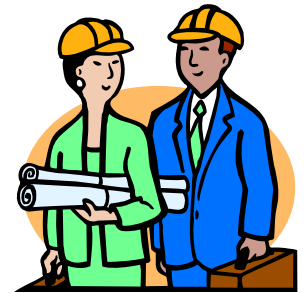
Employers who seek the award of federal contracts will soon need to make sure they are using the federal government's E-verify system to verify the work authorization of their employees. The Department of Homeland Security announced that all federal contractors who are awarded a federal contract after September 8, 2009, will need to use E-verify.

The rule requires the insertion of the E-Verify clause for prime federal contracts with a period of performance longer than 120 days and a value above the simplified acquisition threshold (\$100,000). The rule only covers subcontractors if a prime contract includes the clause. For subcontracts that flow from those prime contracts, the rule extends the E-Verify requirement to subcontracts for services or for

construction with a value over \$3,000. On and after September 8, covered federal contractors will need to E-verify all new employees hired during the contract term and all employees (whether new or existing) assigned to work on the federal contract within the U.S.

The E-verify system compares information from the Employment Eligibility Verification Form known as I-9 against federal government databases to verify worker's employment eligibility. It is a free Internet-based system operated by DHS in partnership with the Social Security Administration.

If you have questions about E-verify and other federal contractor requirements please contact Tom Scroggins at (205) 633-0227.



ENDA Proposes to End Sexual Orientation Discrimination

After its failure to become law in the last Congress, Rep. Barney Frank, D-Mass., has reintroduced the Employment Non-Discrimination Act (ENDA) in the House of Representatives, and early indications are it has a very good chance of passage. ENDA would amend Title VII of the Civil Rights Act of 1964 by prohibiting discrimination on the basis of an employee's sexual orientation, transgenderism, or gender identity.

Introduced on June 19, 2009, ENDA (H.R. 3017) originally had just ten co-sponsors but the number of co-sponsors has increased to a total of 152 as of August 17. ENDA would make it illegal for employers to discriminate on the basis of "actual or perceived" sexual orientation, transgenderism, or gender identity in the same way that it is now illegal to discriminate on the basis of race and gender. Thus, an employer could be held to unlawfully discriminate against someone based on an incorrect perception of an employee's sexual orientation if ENDA passes. Moreover, an employer would be prohibited from "associational discrimination," i.e. discriminating against an employee because of that employee's association with someone who is actually or perceived to be of a particular sexual orientation, transgendered, or of a different gender identity.

ENDA does exempt religious organizations, veteran's service groups, and the military from coverage. ENDA would not require same-sex partner benefits. It would, however, require employers to permit employees who have undergone or are undergoing "gender transition" to use the shower and dressing facilities designated for the gender to which the employee is transitioning. For example, an employer would have to allow a male employee undergoing gender transition to use the women's shower, bathrooms, and locker rooms. Additionally, regardless of any dress or grooming standards, an employer would have to permit any employee that has undergone or is undergoing gender transition to adhere to the dress or grooming standards for the gender to which the employee is transitioning. Thus a male employee undergoing gender transitioning could show up for work dressed like a woman, and there is nothing an employer could do about it provided the man did not violate the dress and grooming standards established for female employees. The gender transition process can be very lengthy often beginning a diagnostic assessment years prior to any actual surgery, and persons wishing to have these elective surgeries frequently spend years saving money to pay for them all the while declaring themselves to be

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ENDA Proposes to End Sexual Orientation Discrimination

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actively in the gender transition process. If ENDA passes some clarity on when someone is in the “gender transition” process will most certainly be needed.

There appears to be enough support for ENDA in the House of Representatives for it to pass there just as it did once before in the previous Congress, but the margin of support in the Senate is razor thin. However, with the resolution of the Minnesota senate race in favor of Sen. Al Franken, the ability of ENDA

supporters to invoke cloture and pass ENDA in the Senate seems assured. President Obama has declared his support for the legislation, and ultimately ENDA has a very good chance of becoming law in this Congress which ends in 2010.

If you have questions about ENDA or other employment discrimination laws please contact Tom Scroggins at (205) 633-0227.

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